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Federal Communications Commission
Office of the Secretary

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Policy Implications of the Changing Video Marketplace	)	MM Docket No. 91-221
	)	

To: The Commission

REPLY COMMENTS OF TELE-COMMUNICATIONS, INC.

Tele-Communications, Inc. ("TCI") submits these Reply Comments in response to selected comments in this proceeding. Notwithstanding the Commission's request for "specific evidence and analysis" (Notice of Inquiry at ¶2), network and broadcast commenters largely have repeated the findings of the Office of Plans And Policy Report ("OPP Report")[1] in advocating a variety of regulatory "reforms" designed to enhance their competitive position in the video marketplace.

As TCI noted in its initial comments, the OPP Report offers a useful framework for the necessary empirical analysis but contains numerous factual observations and

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1 F. Setzer and J. Levy, Broadcast Television in a Multichannel Marketplace, Federal Communications Commission, Office of Plans And Policy, Working Paper No. 26, 6 FCC Rcd 3996 (June 1991).

conclusions which appear to be unsupported or inconsistent. TCI Comments at 3-4; see also Association of Independent Television Stations, Inc. ("INTV") Comments at 9, n.6 and Exhibit 2; Association of America's Public Television Stations and the Public Broadcasting Service ("PBS") Comments at 8-17. The comments in this proceeding reflect considerable controversy over the current health and future well-being of the networks and other broadcasters. The causes of and regulatory "cures" for the alleged problems of networks and broadcasters also present complicated and disputed factual issues.

I. The Record Evidence Of The Present Financial Condition Of Networks And Broadcasters And Their Future Prospects Is Contradictory And Inconclusive.

Most broadcast commenters simply adopt the OPP Report's gloomy conclusion that "broadcast television...has suffered an irreversible decline in audience and revenue share, which will continue throughout the decade." OPP Report at vii. However, the broadcast industry's description of its financial health to federal regulators just three months ago in the "Highly-Leveraged Transactions" proceedings was substantially more positive:

> The vast majority of television and radio stations are financially sound. Throughout the eighties, television station profits have shown remarkable consistency for affiliated stations, and profits have shown an increase for independent stations.

* * *

> Independent stations, many of which entered the industry in the early and mid-eighties, experienced a decline in profits in the mid-eighties, but have since seen substantial improvement.
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> * * *
>
> Similarly, television station cash flow figures have been consistent for affiliate stations and have shown an increase for independent stations. (notes omitted).

Comments of the National Association of Broadcasters, In the Matter of the Supervisory Definition of Highly-Leveraged Transactions, Department of the Treasury, Docket No. 91-7; Federal Deposit Insurance Corporation, Docket No. 050984; Federal Reserve System, Docket No. R-0734, 7-8 (filed September 23, 1991).

The record in this proceeding also contains conflicting predictions of the short- and long-term prognoses for the broadcast industry. For example, while NBC cites reported forecasts of significant losses in "its network business" in 1991, other commenters point to predicted network profits, tempered by a recessionary economy and bad business deals. Compare National Broadcasting Company ("NBC") Comments at 39-40 with Motion Picture Association of America, Inc. ("MPAA") Comments at 7, n.9. NBC makes no attempt to reconcile its gloomy self-appraisal and forecast with an NBC executive's description of the network little more than eighteen months ago as "an oil well gushing, spilling off $500 million into buckets. And [we] just gather up the buckets." B. Carter, "The Man Who Owns Prime Time," New York Times Sunday Magazine, 22, 24 (March 4, 1990).

Likewise, projections of future audience erosion and of network and broadcast advertising revenues vary widely. In contrast to the bleak forecasts of networks and their affiliates (see NBC Comments at 22),[2] independent analysts project that network prime time audience share will "bottom out...at 61 percent." MPAA Comments at 8. Likewise, compound growth rates of 6 percent and 6.5 percent in advertising sales are projected for television broadcasters and the networks from 1991 to 1995, substantially exceeding the OPP Report projections. MPAA Comments at 6-7. Thus, according to one analyst, "television stations will still dominate television viewing...accounting for 70.7 percent of total television viewing in 1995.... Moreover, broadcasting will continue to garner more than 90 percent of total television advertising...." MPAA Comments at 9, quoting Veronis, Suhler & Associates, "Communications Industry Forecast" (June 1991) at 71.

2 NBC projects a three-network prime-time share of 59 for 1991 based on selected comparative ratings. However, in both of the examples provided by NBC, the "erosion" in the network share is largely attributable to the emerging Fox network. NBC Comments at 21-22.

The causes of any decline in the financial performance of networks and broadcasters also are uncertain and disputed. At the outset, networks and broadcasters acknowledge that the recessionary economy "is clearly in part responsible" for the current financial condition of broadcasters. NBC Comments at 27. With revenue increases slowing, network and broadcast commenters identify higher programming costs, which they attribute principally to increased cable and independent broadcasting competition, as the controlling cost "escalator." OPP Report at 32, 44, 146; NBC Comments at 34-37; CBS Comments at 52-54; Fox Broadcasting Company Comments at 6, 19.

For example, NBC claims that cable competition for sports programming has caused sports rights costs to go "through the ceiling." See NBC Comments at 35-37. It offers the ESPN and TNT bid for Sunday Night NFL football as an example of cable programmers outbidding the networks for major sports programming and "set[ting] the level of the total rights package." NBC Comments at 36-37, n.34. Other participants in the bidding process present a far different factual interpretation. Contrary to the claim that the ESPN/TNT bid represented a dangerous migration of sports programming from broadcast to cable television (OPP Report at 79), the NFL explains that the three networks had no interest in the Sunday Night package, i.e. "it was an eviction of those games by the broadcast networks." NFL Comments at 4-5. ESPN attributes the escalation in sports rights fees principally "to vigorous competition among the networks themselves for event rights." ESPN Comments at 2. This explanation is consistent with the OPP Report's general observation that "the large programming expenditures of the broadcast networks may suggest that broadcast networks' programming funds are being spent inefficiently." OPP Report at 154.

Other commenters suggest that increased syndicated programming costs are a principal component in the "rapidly increasing expenses" of broadcasters. Office of Communication of the United Church of Christ Comments at 3. The rising cost of syndicated programming has been attributed to increased demand generated by the increased number of independent television stations. Id. at 9. For example, CBS observes that "broadcast television has now become such a voracious consumer of programming that there is barely enough to go around." CBS Comments at 53.

Thus, the record in this proceeding does not: (1) plainly establish the current financial condition of and short-term prospects for networks and broadcasters; (2) reliably predict future trends in network and broadcast television viewership shares and advertising revenues; or (3) conclusively identify the causes of any decline in the financial condition of networks and broadcasters. Clearly, the present and future impact of competition from cable television has not been quantified, and no evidence of unfair competition has been introduced.

II. The Present Record Is Inadequate To Justify The Regulatory Initiatives Suggested By Commenters, Much Less Any Recommendation For Legislation.

One or more of the Commission's rules limiting network and broadcast ownership may no longer serve a valid purpose in the current competitive video and information marketplaces. However, the empirical evidence in this proceeding appears insufficient to identify specific regulatory responses to the perceived problems and their causes. If the Commission tentatively concludes that specific regulations should be eliminated or changed, separate or consolidated rulemaking proceedings are appropriate.[3]

Several parties apparently view this inquiry as an opportunity to seek lobbying support for far-reaching and

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3 The Commission already has initiated separate rulemaking proceedings to address telco-cable and network-cable cross-ownership issues. See Further Notice of Proposed Rulemaking, First Report And Order And Second Further Notice of Inquiry in CC Docket No. 87-226, FCC 91-334, released November 22, 1991; FCC News Release Report No. DC-2015, released December 12, 1991, announcing adoption of the Second Further Notice of Proposed Rulemaking in MM Docket 82-434, FCC 91-405, adopted December 12, 1991.

controversial legislative proposals regarding compulsory copyright and retransmission consent issues. However, the Commission previously has recognized that, in contrast to the communications issues which it typically considers in its rulemaking proceedings, compulsory license and retransmission consent involve complex copyright issues affecting the fundamental relationships among cable operators, broadcasters, program producers and other participants in the video marketplace. Compulsory Copyright License for Cable Retransmission, 66 R.R.2d 1259 at ¶3 (1989); Cable Television Syndicated Program Exclusivity and Carriage of Sports Telecast, 56 R.R.2d 625 at ¶¶9, 19 (1984). Consequently, a clear and convincing factual foundation is essential for any legislative recommendation which would substantially alter these relationships. The incomplete and contradictory record in this proceeding provides no basis for any legislative recommendations. In any event, the Commission should first conclude the current must-carry proceeding, the outcome of which may substantially affect such issues.

Conclusion

The equivocal factual record in this proceeding regarding the current financial health and future well-being of the networks and other broadcasters does not justify the wide-ranging regulatory relief which various commenters seek. If the Commission identifies particular broadcast regulations which are anachronistic because of changes in the video marketplace, specific or consolidated rulemaking proceedings are appropriate. However, the current record clearly provides no basis for any recommendation to Congress regarding compulsory copyright and/or retransmission consent issues.

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Respectfully submitted,

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